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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,
Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE COMMON CAUSE AND COMMON CAUSE MINNESOTA IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE COMMON CAUSE AND COMMON CAUSE MINNESOTA IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

Common Cause is a non-profit, non-partisan membership corporation organized under the laws of the District of Columbia.[1] Its principal objective is to further the interests of its 250,000 members in honest and responsible government. Common Cause Minnesota is the state affiliate of Common Cause. Common Cause and its affiliates seek to promote these interests through reform of government and the political process.

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[1] All parties to this case have consented to the filing of this brief. Copies of the written consents of the parties are on file with the Clerk of the Court.

Common Cause has a longstanding interest in campaign finance reform. Common Cause has participated, as either a party or as *amicus curiae*, in many of the campaign finance cases before this Court over the last twenty years.[2] Common Cause has also actively supported campaign finance reform legislation at the state and federal levels. Representatives of Common Cause Minnesota were part of a broad-based task force that helped draft the Minnesota Ethics in Government Act, the legislation at issue in this case.[3] Common Cause state affiliates have also actively supported campaign finance reform in other states, including at least twelve states which have enacted comprehensive voluntary public campaign financing schemes. In addition, Common Cause has participated in drafting and promoting federal legislation containing provisions comparable in substance to those under review here. The decision of the Eighth Circuit, if permitted to stand, may imperil some or all of this legislation by casting doubts as to the legality of provisions integral to viable and effective public financing mechanisms.

BACKGROUND

Since this Court broadly endorsed voluntary public financing in *Buckley v. Valeo*, 424 U.S. 1 (1976), the states, as well as Congress, have grappled with how to structure viable and effective public financing programs. These reform efforts have been induced by concerns of compelling constitutional dimensions.

First, reform has been fueled, in large part, by concern over the corrupting effects of money on politics. The

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[2] *See, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976).

[3] *See* Petition for a Writ of Certiorari of John L. Holahan *et al.* at 5 [hereinafter "Petition for a Writ of Certiorari"].

House report on H.R. 3 observed that "[i]f there is one overriding goal of this legislation, it is to restrain the power of money as a force in our political process and as a determinant of its outcomes." H. R. Rep. No. 375, 103d Cong., 1st Sess. 30 (1993). This view reflects a widespread belief among legislatures that contributions, especially large contributions, create implicit or explicit *quid pro quos* between the contributor and the candidate.[4] As Senator Dale Bumpers of Arkansas recently lamented, "bill after bill has been defeated in this body because of campaign money." 139 Cong. Rec. S7187 (daily ed. June 15, 1993) (statement of Sen. Bumpers). "[O]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27.

Second, actual and apparent *quid pro quos* have caused widespread public cynicism concerning the electoral process. For example, a 1992 poll revealed that 74% of registered likely voters agreed that "Congress is largely owned by the special-interest groups," 83% agreed that the "[s]pecial-interest groups [that give campaign contributions to candidates] have more influence [over the government] than the voters," and 85% agreed that

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[4] For instance, many industry political action committees (PACs) give overwhelmingly to incumbents who sit on committees that have jurisdiction over their interests. These contributions are frequently made without reference to party affiliation, ideology, or other factors that influence contributions.

> Dairy industry committees, for instance, fund incumbents of both parties, with special attention to members who sit on congressional committees dealing with agriculture. They contribute seven dollars to incumbents for every dollar to challengers but do not hesitate to supply money to both an incumbent and challenger if it appears that the latter might win.

Gary C. Jacobson, *Money in Congressional Elections* 77 (1980). *See also* Philip M. Stern, *The Best Congress Money Can Buy* 47 (1988).

"[s]pecial interest money buys the loyalty of candidates." [5] This weakening of the democratic commitment implicates important government interests. The corrosive effect of public cynicism is reflected in low voter participation, a pervading sense of disenfranchisement from the political system, and a corresponding lack of faith in the democratic process.

Third, the creation of comprehensive campaign financing systems reflects legislative concern over skyrocketing campaign costs. Since 1976, "[s]pending in Senate races has increased more than five-fold, from a total of $38.1 million in the 1976 election cycle to a total of $210.8 million in the 1992 elections." [6] Similarly, the average cost of winning a House seat has tripled in the last 12 years—escalating from $178,000 in 1980 to $554,000 in 1992,[7] and the cost of campaigning rose an additional 18% for the 1994 House and Senate elections.[8] While

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[5] Gordon S. Black & Benjamin D. Black, *The Politics of American Discontent* 179 (1994) (Table 1). This sentiment was also well expressed in a report cited by the House report on H.R. 3:

> People believe two forces have corrupted democracy. The first is that lobbyists have replaced representatives as the primary political actors. The other force, seen as more pernicious, is that campaign contributions seem to determine political outcomes more than voting. No accusation cuts deeper because when money and privilege replace votes, the social contract underlying the political system is abrogated. Influenced by this widespread perception, people decided that voting doesn't really count anymore, so why bother?

H.R. Rep. No. 375, 103d Cong., 1st Sess. 30 (1993) (quoting *Citizens and Politics: A View from Main Street*, prepared for the Kettering Foundation by the Harwood Group (June 1991)).

[6] Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994) (footnote omitted). Mr. Wertheimer and Ms. Manes are officers of Common Cause.

[7] H.R. Rep. No. 375, 103d Cong., 1st Sess. 30 (1993).

[8] *See* Charles R. Babcock, *Congressional Campaign Spending Up 18% Since 1992*, Wash. Post, Nov. 6, 1994, at A34.

the data is most readily available on campaigns for federal office, costs for campaigning for state offices have increased substantially as well over the last two decades.[9] The cost of running for office has been driven upwards not only by the direct investments of the candidates, but also by the rapid growth in independent expenditures. In 1976, independent expenditures in all federal elections amounted to only $2,033,207.[10] By 1984, independent expenditures had leaped by over 1100% to $23,434,380.[11]

The staggering costs of electioneering have forced candidates to make enormous commitments to fundraising efforts, thereby reducing the time they can commit to debate on issues of public concern.[12] Moreover, the increased cost of running for office has effectively excluded potential candidates from entering races, limiting voters' choices.[13]. "[T]he cost of running for statewide offices and

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[9] *See* Neb. Rev. Stat. § 32-1602 (1993) (citing a dramatic increase in spending for state office).

[10] Joseph E. Cantor, Congressional Research Service, *Campaign Financing in Federal Elections: A Guide to the Law and Its Operation* 73 (1993) (Table 18).

[11] *Id.*

[12] *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). *See also* Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160, 1169-70 (1994) ("the time that elected officials spend raising money is always time away from the serious business of governing and almost always time away from soliciting the ideas and views of ordinary citizens"); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1281 & n.1 (1994); Dan Clawson *et al., Money Talks: Corporate PACs and Political Influence* 7-9 (1992); Frank J. Sorauf, *Money in American Elections* 183-84 (1988).

[13] The Florida legislature noted similar concerns:

> the costs of running an effective campaign for statewide office have reached a level which tends to discourage persons from becoming candidates and to limit the persons who run for such office to those who are independently wealthy, who are sup-

legislative seats has risen greatly[;] . . . many qualified candidates are excluded from the democratic system as a result of such rising cost." Neb. Rev. Stat. § 32-1602 (1993).[14]

In 1993, the Minnesota legislature, responding to these concerns and acting on recommendations provided by a broad-based task force comprised of legislators, lobbyists, professionals from the Ethical Practice Board, and representatives of numerous public service organizations, enacted extensive amendments to the Minnesota Ethics in Government Act. The Amendments substantially broadened Minnesota's public financing system, which provided for, *inter alia*, public subsidies to candidates who agree to certain expenditure and reporting restrictions.[15] In order to provide a workable alternative to private financing of elections and to ensure adequate public debate from differing viewpoints, the legislature provided that, if a nonparticipating candidate made an expenditure in excess of a predetermined amount or if an independent expenditure was made that expressly advocates the defeat of a participating candidate or the election of his or her opponent, the spending limits on the participating candidate would be raised and the candidate would be entitled to an additional public subsidy. Minn. Stat. Ann. §§ 10A.25(10b), 10A.25(13) (West 1994). After the District Court found these statutory provisions relating to

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ported by political committees representing special interests which are able to generate substantial campaign contributions, or who must appeal to special interest groups for campaign contributions.

Fla. Stat. Ann. § 106.31 (West 1992).

[14] *See also* John Harwood, *Political Treadmill: For California Senator, Fund Raising Becomes Overwhelming Burden*, Wall St. J., Mar. 2, 1994, at A1 ("[the pressure to raise money] squeezes out potential competitors who can't keep the financial pace").

[15] Minnesota first enacted a public financing system in 1974. Act of April 12, 1974, ch. 470, §§ 30-32. The Act was amended in 1976 to conform to the rules set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976).

independent expenditures to be constitutional,[16] the Court of Appeals for the Eighth Circuit reversed, concluding that the statute violated the First Amendment.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT WITHIN THE CIRCUITS AS TO THE APPLICABILITY OF THE FIRST AMENDMENT TO PUBLIC CAMPAIGN FINANCING LAWS

The Court should grant the Petition for a Writ of Certiorari to resolve a conflict between the decision of the Court of Appeals in this case and the decision of the First Circuit in *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). The conflicting opinions of the Circuits have created substantial uncertainties for Congress as it attempts to draft appropriate and constitutional campaign finance reform legislation and for the state legislatures and city councils currently considering how to structure voluntary public financing programs that present an attractive alternative to public campaign financing.

In *Vote Choice*, the First Circuit considered the constitutionality under the First Amendment of the Rhode Island campaign finance law.[17] In 1992, the Rhode Island General Assembly enacted a comprehensive public financing system for its gubernatorial candidates. The program provided matching funds for up to a maximum of $750,000 per candidate and required participants to observe certain restrictions on campaign spending and related activities. To make the option of public financing

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[16] None of the parties to this matter challenged the portion of the statute that provides additional funds (and a higher expenditure limit) when the spending of nonparticipating candidates exceeds the program's limits.

[17] Common Cause and Common Cause Rhode Island appeared as *amici curiae* in the *Vote Choice* litigation.

more attractive to candidates and thereby increase participation in the system, the 1992 act provided for a "contribution cap gap." *See* 4 F.3d at 30. Under the preexisting statutory scheme, a candidate was entitled to receive contributions of up to $1,000 from any person or political action committee in a calendar year. The 1992 public financing amendments retained the $1,000 limit for those candidates who chose not to enter the financing system and doubled the limit to $2,000 for candidates who choose to accept the benefits and restrictions of public financing. Participating candidates were entitled to matching funds of up to $2,000 per contributor.

Two Political Action Committees (Vote Choice and Gun Owners PAC), as well as the Rhode Island affiliate of the American Civil Liberties Union, argued that the "cap gap" and other provisions of the law penalized speech in violation of the First Amendment rights of candidates who did not participate in the public financing program. The First Circuit properly rejected this "penalty" theory and held that the Rhode Island statute does not "impose[] any burden on first amendment rights." *Id.* at 39. The Court concluded that the provision of incentive matching funds by the government to candidates in a public financing program did not raise a cognizable First Amendment claim for those outside the system—even for those who may have been affected in an ancillary manner by the expenditure of government funds.

This holding is based on an altogether different First Amendment analysis from, and conflicts with, the decision of the Court of Appeals in this case. While the provisions of the Rhode Island and Minnesota statutes differ, both states' public financing programs raise the same conceptual issue: whether the provision of incentives to candidates who opt to participate in a public financing system infringes on any First Amendment rights of those outside the system whose own speech may not be curtailed but who may be relatively disadvantaged by

the government expenditures. In both instances, the statute offers a substantial governmental benefit to participants in the system but does not limit or penalize persons outside the voluntary program. In both cases, the statutes are content-neutral: the effect, if any, on those outside the voluntary program arises only from the grant of a government benefit to those candidates who have chosen to join the public financing system.

As in *Vote Choice*, the public defendants in this case argued that the Minnesota system does not raise a cognizable claim under the First Amendment, because it involves only the expenditure of funds by the government and creates no direct restraints on persons outside the system. Unlike the First Circuit in *Vote Choice*, the Eighth Circuit explicitly rejected this argument by holding that the indirect effects of government spending were sufficient to warrant the "strict scrutiny" test that it applied. Petition for a Writ of Certiorari at A11. In applying strict scrutiny, the Court of Appeals created a direct conflict with the constitutional analysis and holding of the First Circuit that such government spending does not implicate the First Amendment rights of those outside the campaign finance system. The two cases cannot be reconciled.

The position of the First Circuit in *Vote Choice* was correct. This Court has consistently held that a statute does not implicate First Amendment interests when the government provides content-neutral subsidies for some, but not all, speech. *See Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983) ("[w]here governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader' ") (citations omitted). *See also Rust v. Sullivan*, 500 U.S. 173 (1991) (the government may selectively fund program to encourage some, but not all, free speech activities and is entitled to determine the limits of that program). These cases, as well as numerous

other Supreme Court decisions, make clear that the states, as well as Congress, may confer benefits on one group without raising an entitlement by others to equal benefits. *See, e.g., Maher v. Roe*, 432 U.S. 464 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Cammarano v. United States*, 358 U.S. 498 (1959).[18]

Moreover, the Minnesota independent expenditure provisions tend to enhance public debate and the free and unfettered exchange of ideas. As the District Court noted below, "[t]o the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect." *See* Petition for a Writ of Certiorari at A39. *See also Vote Choice*, 4 F.3d at 39 ("the challenged statute furthers, rather than smothers, first amendment values").[19] The provision of additional funds to candidates who confront independent expenditures encourages candidates to opt for public financing by ensuring that they, like candi-

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[18] The Minnesota, as well as the Rhode Island, statute is distinguishable from the statutes held unconstitutional in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 14-15 (1986), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). In those cases, the statutes at issue required private entities to finance the messages of others. By thus compelling the plaintiffs to speak for others, the statutes violated their First Amendment rights. In contrast, the statute at issue here involves public—not private—subsidies, requires nothing of the persons making independent expenditures, and merely provides a mechanism so that candidates within the system may have a means to engage in debate.

[19] Similarly, the House report on H.R. 3 noted that:

> [t]hese provisions adhere to First Amendment values by allowing for an increase in debate and increase in the voices which may be heard. We emphasize that the persons making the independent expenditures are not restricted; they may do so in unlimited amounts. Thus, these provisions enhance the ability to speak. . . .

H.R. Rep. No. 375, 103d Cong., 1st Sess. 53 (1993).

dates who eschew the system, will have the resources to engage in public debate and further public knowledge of the contested issues. The Minnesota statute thus advances core First Amendment values in the " 'widest possible dissemination of information from diverse and antagonistics sources,' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (citation omitted), and does not act as a restraint on the First Amendment rights of respondents.

II. THE COURT SHOULD GRANT THE PETITION TO PRESERVE FEDERAL AND STATE EFFORTS TO ENACT COMPREHENSIVE CAMPAIGN FINANCE REFORMS AND PUBLIC FINANCING PROGRAMS

The Court should grant the Petition for a Writ of Certiorari because the decision of the Court of Appeals, which applies strict scrutiny to the provisions at issue, creates significant uncertainty as to the constitutionality of comprehensive campaign finance reform legislation that has been enacted in several states.[20] In addition, the decision below casts into doubt legislation currently pending before the legislatures in a number of states, as well as bills that may be presented to the next Congress. By granting the Petition, this Court would bring badly needed clarity to an area that has experienced substantial change over the past two decades.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court broadly endorsed voluntary public financing as a constitutional means of curtailing campaign finance abuses.

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[20] In addition to the public financing programs described herein Michigan, New Jersey, Hawaii, Massachusetts, Maryland, and North Carolina have all enacted public financing programs. *See* Mich. Comp. Laws Ann. § 169.261 (West Supp. 1994); N.J. Stat. Ann. § 19:44A (West 1989 & Supp. 1994); Haw. Rev. Stat. §§ 11-217, 11-219, 11-222 (1994); Mass. Gen. Laws Ann. ch. 10, § 42 (West 1986); Md. Ann. Code art. 33, § 31 (1993); and N.C. Gen. Stat. § 163-278 (1994). Several cities and counties have also enacted public financing programs, including New York City; Long Beach, California; Los Angeles; Tucson, Arizona; Sacramento County, California; and King County, Washington.

While the Court concluded that certain expenditure limits violated the First Amendment, it upheld the public financing provisions (and the expenditure limits contained therein) of the Federal Election Campaign Act as a valid initiative to "reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91.

As part of these initiatives and in response to growing concerns about the consequences of increasing independent expenditures and spending by nonparticipating candidates on the viability and effectiveness of public financing systems, many states created flexible spending caps as core provisions of their public financing systems. Absent these reforms, a nonparticipating candidate or independent group might make massive expenditures against the participating candidate, thereby leaving him or her without adequate resources to engage in full public debate because of the spending limits imposed under the program.[21] Consequently, these provisions are crucial to ensure that public financing presents a workable alternative to private campaign contributions.

The Minnesota provisions struck down below represented that state's efforts to provide a constitutionally acceptable alternative to private campaign finance.[22] As

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[21] To be sure, not all public financing systems contain flexible cap provisions. The presidential financing system, for instance, does not contain such provisions. Of course, the Federal Election Campaign Act was enacted substantially before the recent growth in independent expenditures, *see infra* n.27, and there was thus a relatively small interest in flexible caps at the time. Moreover, there is a materially greater possibility that independent expenditures could effect the viability and effectiveness of a $600,000 public campaign financing system than a $60 million system such as the presidential system.

[22] Chapter 318 was enacted after a task force recommended legislation that would "enhance the public's confidence in the political process and in public officials" and would "encourage a broader

in other states, the Minnesota legislation provides candidates with state funds once they agree to abide by specified spending limits. As part of this comprehensive framework, in 1993, the legislature amended the statute to include independent expenditure provisions, Minn. Stat. Ann. § 10A.25(13),[23] which (a) increase a candidate's expenditure limits by the amount of independent expenditures made either to defeat the candidate or to promote the candidate's major party oponents; and (b) create a supplemental public subsidy equal to one-half the amount of such independent expenditures.[24]

The Minnesota legislature determined that these independent expenditure provisions were necessary to ensure that the public finance program remained a realistic option for candidates.[25] Independent expenditures have grown significantly in recent years, both in [26] and out [27] of Min-

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public participation in the electoral process." *See* Petition for a Writ of Certiorari at A103.

[23] The statute defines "independent expenditures" as expenditures expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.

Minn. Stat. Ann. § 10A.01(10b) (West 1994).

[24] These provisions are triggered once an independent expenditure exceeds a $100 threshold. The Minnesota statute requires individuals, political committees, and political funds to report their intent to make an expenditure in excess of $100. Minn. Stat. Ann. § 10A.20(6B) (West 1994). After the independent expenditure has been reported, the opposed candidate receives notice of the increase in expenditures limit and becomes eligible for additional public funds. *Id.* at § 10A.25(13).

[25] *See* Petition for a Writ of Certiorari at 12-13.

[26] For instance, independent expenditures during the 1992 elections amounted to approximately $332,000, as compared to candidate spending of about $9 million. *Id.* at 13.

[27] For example, in the 1988 presidential and congressional elections, there was approximately $21.3 million in independent expendi-

nesota. The independent expenditure provisions thus further two substantial government interests: they provide appropriate incentives for candidates who may fear that the expenditure limits of the public financing system would leave them with inadequate resources to respond to issues raised through independent expenditures [28] *and* they provide adequate resources to ensure that there will be broad-based debate on matters of public concern. *See Buckley*, 424 U.S. at 47.[29]

The Minnesota statutory provision held unconstitutional is similar in operation to statutes enacted in at least five other states. Under each of these statutes, as well as in the proposed federal system for contests for the House of Representatives and the Senate, a participating candidate's expenditure limit would be increased if an opposing candidate makes expenditures in excess of that permitted under the voluntary system or if another group or individual makes independent expenditures targeted against the participating candidate or in favor of his or her opponent. Three states, as well as Minnesota, have enacted statutes that contain provisions that (a) release participating candidates from existing expenditure limits, and (b) provide participating candidates with additional public funds, when a nonparticipating opponent's spending exceeds the designated expenditure limits. *See* Ky. Rev. Stat. Ann. §§ 121A.030(5)(a), 121A.060(2)(c), 121A.080(4)(a) (Michie 1994); Fla. Stat. Ann. §§ 106.353(2), 106.355 (West 1992); Neb. Rev. Stat. § 32-1606 (1993). At

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tures, compared with only $2 million in 1976, S. Rep. No. 41, 103d Cong., 1st Sess. 23 (1993).

[28] *See id.* at 24.

[29] Although, as the Eighth Circuit observed, nearly all of the candidates in Minnesota opted for public financing in 1992, future candidates would be unlikely to view the program as a realisitc alternative to private campaign contributions if, as expected, independent expenditures continue to increase. *See* Petition for a Writ of Certiorari at 13 (noting that newly-enacted restrictions on direct contributions are likely to lead to a substantial increase in independent expenditures).

least two other states permit participating candidates to raise additional private contributions and make additional expenditures should a nonparticipating opponent's expenditures exceed the program's spending limits. *See* R.I. Gen. Laws § 17-25-24 (1993); Wis. Stat. Ann. § 11.50(2)(i) (West Supp. 1994). Like the Minnesota, Kentucky, Florida, and Nebraska statutes, the Senate and House bills have provided for increases in the campaign expenditure ceilings, as well as additional public funds, based on the amount of expenditures by nonparticipating candidates,[30] and, like Minnesota, based on the amount of independent expenditures.[31]

Not only does the Eighth Circuit's decision threaten to invalidate other independent expenditure provisions, it

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[30] *See* S. 3, 103d Cong., 1st Sess. § 101(a) (1993); H.R. 3, 103d Cong., 1st Sess. § 121(a) (1993).

[31] At the federal level, both houses of Congress determined that such provisions would help ensure that a public financing program remains a realistic alternative for prospective candidates without unconstitutionally restricting the ability of individuals to make independent expenditures. *See* H.R. Rep. No. 375, 103d Cong., 1st Sess. 53 (1993); S. Rep. No. 41, 103d Cong., 1st Sess. 24-25 (1993).

Section 302 of H.R. 3 required that any individual making an independent expenditure of more than $5,000 at least 20 days before the election, or more than $1,000 within 20 days of the election but not later than 24 hours before the election, file a report disclosing the expenditure. Under section 121(a) of H.R. 3, once independent expenditures exceeded $10,000 from all sources, participating candidates would have been permitted to exceed their spending limits and would have been entitled to matching funds.

Similarly, section 133 of S. 3 required that any individual making an independent expenditure of more than $10,000 no later than 24 hours before the election file a report. Under section 101 of S. 3, participating candidates would have been permitted to exceed the spending limits and would have received a subsidy equal to the amount of the independent expenditure for those expenditures that exceeded $10,000 from a single spender.

H.R. 3 and S. 3 were each adopted by their respective houses of Congress. The motion to submit S. 3 to a House-Senate conference, however, was defeated by a filibuster. We expect that both houses of Congress will consider similar legislation in the future.

raises doubts about those statutory provisions that increase public funding for candidates who have chosen that route when candidates who do not opt for public financing spend funds in excess of the participant's limit. These provisions implicate comparable policies as the Minnesota statute, raise comparable legal issues, and are comparably cast into doubt by the decision of the Eighth Circuit.

As a group, these provisions are integral to public financing programs—and the acceptance of voluntary spending limits—as a realistic alternative to private campaign finance. Without such carefully balanced measures, candidates who would otherwise seek to diminish the burdens and entanglements of private fundraising will be unlikely to participate in public financing programs. Moreover, the decision raises doubts as to whether the states may impose a financially sustainable system with sufficient flexibility to ensure that candidates within the system will have adequate resources to engage others in the public debate that is at the core of democratic politics. As a result, First Amendment values will suffer.

CONCLUSION

For the reasons set forth above, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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